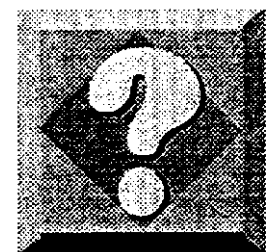


8

Leasebacks

Frequently Asked Questions About Leasebacks

| | |
|--|-------------|
| ➤ <i>What is a leaseback?</i> | Section 8.1 |
| ➤ <i>When should a leaseback be used?</i> | Section 8.1 |
| ➤ <i>Can a Military Department transfer property to an LRA and then lease it back for its own use?</i> | Section 8.1 |
| ➤ <i>Who is eligible to apply for a leaseback?</i> | Section 8.1 |
| ➤ <i>Are Federal and homeless screenings required before transferring property under a leaseback?</i> | Section 8.2 |
| ➤ <i>How does an LRA apply for a leaseback?</i> | Section 8.3 |
| ➤ <i>How is leaseback property conveyed?</i> | Section 8.4 |
| ➤ <i>What terms are required in the lease?</i> | Section 8.5 |



8. 1 INTRODUCTION

8.1.1 Legislative history

Large parcels of surplus BRAC property are frequently conveyed to an LRA for use in accordance with the LRA's redevelopment plan. But, because Federal users have priority claim on this property, small parcels or even individual buildings within or adjacent to the large parcel maybe claimed by a Federal entity. Should the Federal entity depart at some point in the future, the property would be disposed of by the General Services Administration in accordance with the Federal Property and Administrative Services Act. This subsequent Federal action can disrupt local economic recovery efforts by requiring the community to go through another lengthy Federal real property disposal process, and could result in uses that are incompatible with the community's redevelopment plans.

Congress recognized that this piecemeal approach could be harmful to long-range planning and development opportunities and changed the law to enable more community control over redevelopment while still allowing the Federal Government the ability to utilize Government property without additional costs. Section 2837 of the National Defense Authorization Act for FY 1996 (Pub. L. 104-106) granted the Department a new property conveyance authority called a leaseback.

8.1.2 A new conveyance method—LRA property ownership while meeting Federal needs

**What is a
leaseback?**

A leaseback is when the Department of Defense transfers nonsurplus BRAC property (property that is still needed by a Federal Department or Agency) by deed or through a lease in furtherance of conveyance to an LRA. The transfer requires that the LRA lease the property back to the Federal Department or Agency for no rent to satisfy a Federal need for the property. By law, only property at BRAC '91,'93, and '95 sites can be transferred under this authority.

8.1.3 Appropriate uses of a leaseback

**When should a
leaseback be used?**

The leaseback authority is designed to be used in those situations where small parcels or individual buildings needed by a Federal entity are surrounded by, or adjacent to, a large parcel of property which will be conveyed to the local community. This authority is not intended to be used to convey property that is needed by DoD or another Federal entity that is easily segregated from the rest of the property being conveyed to the community for redevelopment purposes.

The leaseback authority is especially useful when a Federal entity only requires use of part of a building or structure. In these cases, DoD would transfer the entire building or structure to the LRA and the LRA would lease back only part of the building or *structure* to the Federal tenant.

**Can a Military
Department transfer
property to an LRA
and then lease the
property back for its
own use?**

A Military Department cannot transfer property to an LRA and then lease it back unless it is acting in an executive agent capacity on behalf of a Defense Agency. Or, if the Military Department transfers property it will be leasing back for its own use, the Service Secretary must certify that the transaction is in the best interest of the Military Department. In making this determination, the Service Secretary should consider financial, mission, as well as property concerns. In all cases, the leaseback transfer must be consistent with the recommendations of the Defense Base Closure and Realignment Commission. In other words, when the Military Departments lease property at a closing or realigning installation, it is considered a property retention and should be treated as such. Guidance for the Military Departments on the procedures for making determinations on property retentions, including the size of cantonment areas, can be found in Section 3.2.1.

8.1.4 Other options to satisfy Federal property needs

The Federal Property and Administrative Services Act of 1949 gives Federal Departments and Agencies priority on the use of excess property, including property at base realignment and closure sites. The leaseback authority does not eliminate this “right of first refusal” to obtain ownership of property. As a result, the Department of Defense cannot require Federal Agencies to give up right of ownership in favor of a leasehold interest. Accordingly, the Military Department should not transfer property using the leaseback authority until it receives written consent from the prospective Federal tenant that it agrees to a leaseback arrangement. In addition, a leaseback will only be considered by a Federal Department or Agency upon the request of the LRA. If a leaseback is requested by the LRA, Federal Agencies are urged to give full consideration to leasing instead of owning the property.

In some cases, the LRA will not request a leaseback transfer or the Military Department or Federal Agency will not agree to a leaseback arrangement. If

property that will be used by a Federal Department or Agency is not transferred to the LRA under a leaseback and then leased back to the Federal entity, the Military Department will retain the property, or transfer it directly to another Federal entity under the normal Federal-to-Federal transfer procedures, as appropriate.

8.1.5 Eligible leaseback recipient

A recognized LRA is the only entity eligible to receive property under a leaseback. After receiving property under a leaseback, an LRA is authorized to transfer ownership rights to one of the political jurisdictions that comprise the LRA. An LRA may also transfer ownership rights to other entities after obtaining the written consent of the Federal Agency occupying the property.

Who is eligible to apply for a leaseback?

Transferring ownership to another entity maybe useful in those situations when the leaseback property lies within or adjacent to property that has been conveyed to an entity other than the LRA (e.g., an airport authority or private developer).

8. 2 DETERMINING POSSIBLE LEASEBACK TRANSFERS

8.2.1 Step 1 - Federal screening

Any property conveyed under a leaseback must first be screened for other DoD and Federal uses in accordance with 32 CFR Part 175, because only property that has been approved by the applicable Military Department for use by another Federal Department or Agency is eligible to be transferred under a leaseback. Property retentions at realigning installations are also eligible for leaseback conveyance provided the retention is consistent with the recommendations of the Defense Base Closure and Realignment Commission. For more information on the DoD and Federal screening process, see Chapter 3.

Are Federal and homeless screenings required before transferring property under a leaseback?

Federal Agencies that express an interest in BRAC property outside of the Federal screening process may, if the LRA is interested, lease property from the LRA that has been leased or transferred to the LRA under other authorities. In these cases, none of the lease restrictions associated with a leaseback apply. The Federal Agency must have the authority to lease property from the LRA.

8.2.2 Step 2- Excess and surplus determination

As part of the Federal screening process, the Military Department makes the excess and surplus determinations, as appropriate. Normally, property that will be conveyed to the community for redevelopment purposes is declared surplus. But, by definition, property identified in the screening process as needed by another Federal entity is not surplus property. Accordingly, property that will be transferred to an LRA under the leaseback authority should not be declared surplus by the Military Department. Due to a lack of clear guidance on this issue prior to the publication of the proposed rule implementing this authority, some Military Department officials determined that property to be transferred under a leaseback should be declared surplus. If the property to be transferred has been declared surplus, the Military Department may withdraw the surplus

declaration. For information about the procedures for withdrawing an excess /surplus declaration, see Section 3.2.3.

8.2.3 Step 3- Initial discussions

The excess/surplus determination marks the start of the LRA's local reuse planning process as described in Chapter 3. During this time, the LRA should decide which parcels of property that are still needed by the Federal Government, if any, the LRA would like conveyed through a leaseback. The LRA should approach the applicable Federal Agency regarding its desire to lease back property and begin preliminary discussions on the terms of the lease agreement.

8.2.4 Step 4- The Redevelopment Act process

In its application to HUD, as required by the provisions of the Redevelopment Act, the LRA should outline any information available regarding what parcels the LRA plans to request be transferred under a leaseback. This should include any preliminary information regarding the terms of the lease that have been agreed upon by both the LRA and Federal Agency. HUD will take a possible leaseback of property into consideration during its review of the LRA's application. The Redevelopment Act process, including the State and local screening process, the development of the redevelopment plan, and the LRA's application to HUD, is discussed in more detail in Sections 3.4 and 3.5.

8. 3 REQUESTING A LEASEBACK

*How does an LRA
apply for a
leaseback?*

LRAs that are interested in obtaining property under a leaseback should, as soon as possible after the Military Department's excess/surplus determination, discuss this option with the applicable Military Department and the Federal Department or Agency which requires use of the property. In addition, as discussed above, the leaseback should be incorporated into the LRA's redevelopment plan. An LRA that has already submitted a redevelopment plan may still be able to take advantage of a leaseback if the LR4 can reach an agreement with the Federal Department or Agency, and the Military Department has not progressed too far toward conveyance of the property under another authority.

LRAs should make a formal request for a leaseback transfer as soon as possible after submission of the redevelopment plan to DoD and HUD. The content of this request will be based upon whether the LRA is pursuing an EDC.

8.3.1 LRAs that are pursuing an EDC

If the LRA is pursuing an EDC, a leaseback transfer should be requested as part of the LRA's EDC application. To address the leaseback of property, the LRA will be required to include several items in addition to the EDC application items outlined in Chapter 7, Section 7.2. These items are:

- . A description of the parcel or parcels the LR4 proposes to have transferred to it and then lease back to a Federal Department or Agency.
- . A written statement signed by an authorized representative of the Federal entity that it agrees to accept a leaseback of the property.

- A statement explaining why a leaseback is necessary for the long-term economic redevelopment of the installation property.

8.3.2 LRAs that are not pursuing an EDC

If the LRA is not pursuing an EDC, the LRA will be required to submit a request for a leaseback to the applicable Military Department. The request should contain, at a minimum, the items listed in Section 8.3.1. If necessary, the Military Department may impose additional requirements.

8. 4 PROPERTY CONVEYANCE

After a disposal Record of Decision has been issued for the property, but before deed transfer, the leaseback property can be leased (using a lease in furtherance of conveyance) to the LRA who would then sublease it back to the Federal Department or Agency. Alternatively, the Military Department can grant the Federal Department or Agency a permit to use the property until deed transfer can be accomplished. When deed transfer can be accomplished, leaseback property can be conveyed in one of two ways:

||| *How is leaseback property conveyed?*

- An *EDC leaseback conveyance* where leaseback property is conveyed as part of an EDC.
- A *stand-alone leaseback conveyance* where leaseback property is conveyed as a stand-alone parcel.

8.4.1 EDC leaseback conveyance

As described in Section 8.3.1, LRAs that are pursuing an EDC should request a leaseback transfer in the EDC application. The leaseback property will be appraised as a package with the EDC property and consideration will be determined following existing EDC guidelines.

8.4.2 Stand-alone leaseback conveyance

For those sites where the LRA is not pursuing an EDC, the Department recognizes that the LRA may still be interested in taking advantage of a leaseback. Since the leaseback authority is a transfer authority, the Military Departments have the ability to transfer leaseback property as a stand alone parcel or parcels not tied to any other conveyance.

For stand-alone leaseback conveyances, the Military Department is required to determine the estimated present fair market value of the property before it is transferred to the LRA. Consideration maybe at or below the estimated present fair market value and payments may be in cash or in-kind. As with EDCS, if the installation is in a rural area, the transfer shall be without consideration if the base closure will have a substantial adverse impact on the economy of the communities in the vicinity of the installation and on the prospect for their economic recovery.

The exact amount of consideration, or the formula to be used to determine the amount of consideration, as well as the schedule for payments, must be agreed upon in writing before the transfer.

8.5 LEASE TERMS

8.5.1 General guidance

**What terms are
required in the
lease?**

The terms of a lease under the leaseback authority should be negotiated between the LRA and the Federal entity. It is the responsibility of the LRA to offer the Federal Department or Agency lease arrangements that encourage choosing the leaseback option. The goal should be to offer terms that afford the Federal tenant rights as close to those associated with ownership of the property as is practicable. If the Federal Agency is a current tenant, the lease should, to the greatest extent possible, maintain the roles and responsibilities of the Federal government that existed prior to transfer of title to the LRA.

8.5.2 Statutory and regulatory requirements

The following statutory and regulatory requirements apply with respect to the LRA's lease to the Federal tenant:

- **Lease term:** The LRA's lease to the Federal entity may be for a term of no more than 50 years, but may provide for options to renew or extend the term of the lease at the request of the Federal entity. Within these statutory limitations, the length of the lease term should be tied to the needs of the Federal tenant.
- **End of Federal need before end of lease term:** All leases must include a provision specifying that should the Federal tenant no longer need the property before the end of the lease term, the remainder of the term may be satisfied by another Federal Department or Agency. The use of the property by the new Department or Agency must be similar to the use under the original lease and, like the use under the original lease, be compatible with the LRA's redevelopment efforts.
- **Rent:** The LRA may not charge rent.
- **Transferring ownership:** The lease must include a provision prohibiting the LRA from transferring ownership rights to another entity (other than one of the political jurisdictions that comprise the LRA) during the term of the lease without the written consent of the Federal Department or Agency occupying the leaseback property.
- **Municipal services:** The Federal Government cannot be required to pay for municipal services (e.g., fire protection, police protection, snow removal) that are normally provided by the locality using tax revenues.
- **Other services:** The Federal entity may pay for other services such as maintenance and repair, utilities, janitorial, grounds keeping, and similar services often provided by a landlord. If these services are the responsibility of the Federal tenant, they *must be* acquired in accordance with standard Federal Acquisition Regulation procedures or otherwise in accordance with applicable statutory and regulatory requirements. Such charges must be for services actually provided to the Federal tenant and at rates no higher than for non-Federal entities.

- **State and local codes:** The LRA will be responsible for building modifications or other actions necessary to meet local building codes or other state or local laws. The Federal tenant may pay for the modifications only to the extent that such modifications would be necessary if the Federal tenant owned, rather than leased, the property.
- **Improvements:** The lease shall provide that the Federal tenant may repair and improve the property at its expense after consultation with the LRA.

8.5.3 Applicability of existing Federal leasing authorities and requirements

The General Services Acquisition Regulation (GSAR) does not apply to a lease under the leaseback authority. However, to the extent these regulations are not inconsistent with the intent of the leaseback authority and the guidance provided in this Chapter, they may serve as a useful source of information and guidance.

The leaseback authority is a property transfer authority. It does not affect a Federal Department or Agency's leasing authorities. Those Federal entities who do not have the authority to lease property, but would like to lease back property transferred under this authority, must work through GSA to negotiate and secure a lease with the LRA. As an alternative, a Federal entity may request a delegation of authority from GSA to enter into a lease with the LRA. Leasing authority will be delegated from GSA to Federal entities on a case-by-case basis. In addition, a Military Department, acting in an Executive Agency capacity, may lease property on behalf of a Defense Agency.

8.6 END OF FEDERAL USE

When the Federal entity that is occupying the leaseback property no longer requires use of the property, one of two things will happen:

(1) If the Federal entity no longer requires use of the property *before the end of the lease term*, another Federal entity can serve out the term of the lease. Although no formal screening is required, the GSA will assist in identifying other Federal interest in leasing the property. In this case, the Federal entity serving out the remainder of the lease term must use the property for a use similar to the original Agency's use of the property. Before exercising this option, the Federal tenant is required to consult with the LRA or the elected body with jurisdiction over the property if the LRA no longer exists. If ownership of the leaseback property has been transferred to another entity, the Federal tenant must consult with that entity.

(2) If the Federal entity no longer requires use of the property *after serving out the lease term and any possible renewals*, there is no requirement to screen for additional Federal interest. Instead, the property would immediately become available for use by the LRA.

This page intentionally left blank